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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

KEVIN HAWKINS, Plaintiff and Appellant, v. DAVID L. MATLOCK, Defendant and Respondent.	B219068 (Los Angeles County Super. Ct. No. BC396545)

APPEAL from an order of the Superior Court of Los Angeles County. John Segal, Judge. Affirmed.

Kevin Hawkins, in pro. per., for Plaintiff and Appellant.

Peterson & Bradford, George E. Peterson and Sherry M. Gregorio for Defendant and Respondent.

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Kevin Hawkins appeals from the dismissal of his action for medical malpractice against David L. Matlock, M.D. (Matlock). The trial court dismissed Hawkins's complaint as a terminating sanction for failure to respond to Dr. Matlock's discovery requests, and Hawkins moved for relief under Code of Civil Procedure section 473.[1] We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On August 22, 2006, Hawkins consulted with Matlock regarding proposed liposuction of his abdomen and hips. In connection with the surgery performed on August 30, 2006, Hawkins signed a consent form describing possible side effects of the surgery and stating that Matlock "can make no guarantee as to the results" of the surgery.

On November 20, 2006, Hawkins wrote to Matlock, complaining that the surgery had not given him the results that Matlock had orally promised—a "v" shaped waist and a flat stomach. Hawkins requested Matlock to refund his total outlay for the procedure and related costs in the sum of $14,992.98.

On August 18, 2008, Hawkins filed a complaint for breach of contract, medical malpractice, and fraud.[2] Hawkins alleged that Matlock had promised him a flat stomach, but knew that such a result was impossible because Hawkins had additional fat behind his intestines that liposuction could not remove.

On October 2, 2008, Matlock served Hawkins with his first set of form interrogatories, two sets of special interrogatories, and a request for production of documents. On October 30, 2008, Hawkins served his responses to the interrogatories. He did not respond to the document production request. On November 6, 2008, Matlock requested further and more complete responses to the interrogatories, contending Hawkins's responses were incomplete, evasive, and contained inappropriate objections. On November 20, 2008, Matlock requested responses to the document production

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[1] All statutory references herein are to the Code of Civil Procedure unless otherwise noted.

[2] The original complaint is not part of the record.

requests. Hawkins did not respond to Matlock's request for further responses to the interrogatories or to the request for production of documents. On December 1, 2008, Matlock moved to compel further responses to form interrogatories and special interrogatories, sets one and two, and to compel responses to the request for production of documents.

On January 12, 2009, the trial court ordered Hawkins to serve supplemental responses to the interrogatories, to comply with the document production request, and to pay $500 in sanctions to Matlock.

On January 22, 2009, Hawkins moved to file an amended complaint for personal injury based upon medical malpractice, and to add a request for punitive damages. At some point, Hawkins also moved for appointment of counsel under title 42 United States Code section 12101.[3]

On April 16, 2009, the trial court ruled on Matlock's demurrer, motion to strike,[4] and motion for terminating sanctions. The court overruled Matlock's demurrer, granted his motion to strike punitive damages, and denied the motion for terminating sanctions and ordered Hawkins to comply with Matlock's discovery requests within 10 days, and imposed $600 in sanctions on Hawkins.

On May 14, 2009, Matlock filed his second motion for terminating sanctions, alleging Hawkins had not complied with the court's order to further respond to his discovery. On June 11, 2009, the trial court granted the motion, noting that during the five months since it had first ordered Hawkins to comply with discovery, he had not done so, in spite of the fact he had found time to "actively participate" in the litigation by seeking affirmative orders from the court. Further, the court noted that Hawkins had twice been sanctioned and that such sanctions had proven ineffective in compelling his

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[3] Hawkins's motion for appointment of counsel under the Americans with Disability Act (ADA) (42 U.S.C. § 12101 et seq.) is not part of the record.

[4] Matlock's demurrer and motion to strike and any response by Hawkins are not part of the record.

responses. After considering lesser sanctions, the court entered its order granting Matlock's motion for terminating sanctions, and dismissed Matlock's motion to continue trial and Hawkins's motion for leave to amend as moot.

On June 19, 2009, Hawkins moved for relief pursuant to section 473 to set aside the terminating sanctions. He claimed that he had not responded to the interrogatories because he was waiting for Matlock to "resend" them and he suffered from memory loss due to a disability. On August 7, 2009, the trial court ruled on his motion, finding that Hawkins had not submitted any evidence in support of his claims of memory loss, and his assertion was not credible that he did not know he had to respond given the court's prior orders. The court concluded Hawkins had not met his burden under section 473, subdivision (b), and denied the motion. The court ordered off calendar Hawkins's motion for leave to amend the complaint and appointment of counsel pursuant to title 42 United States Code section 12101 as moot.

DISCUSSION

Hawkins argues that the trial court erred in denying his motion for relief from default and in finding his motion to amend his complaint and for appointment of counsel under the ADA were moot. He attaches to his opening brief his declaration that states he was certified as an ADA patient in May 2002 and as a result of an accident in 1979 suffers from memory loss.

A party may seek discretionary relief from default within six months under section 473, subdivision (b) on the grounds of "mistake, inadvertence, surprise, or excusable neglect."[5] (§ 473, subd. (b); *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 254.) A party seeking relief under section 473 bears the burden of proof. (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1420.)

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[5] Hawkins, as a pro per, is not entitled to relief under the mandatory provisions of section 473 because those provisions only apply to attorneys. (*Esther B. v. City of Los Angeles* (2008) 158 Cal.App.4th 1093, 1099.)

Section 2023.030 permits the trial court to impose terminating sanctions for misuse of the discovery process. We review a trial court's sanction order for abuse of discretion. (See *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1545 [power to impose discovery sanctions subject to reversal only for arbitrary, capricious, or whimsical action].)

The trial court has broad power to impose discovery sanctions. (*R.S. Creative, Inc. v. Creative Cotton Ltd*. (1999) 75 Cal.App.4th 486, 496.) However, the discovery sanction should be "appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery." (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 793.) The trial court is subject to reversal only where its ruling was arbitrary, capricious, or whimsical. """Only two facts are absolutely prerequisite to imposition of the sanction: (1) there must be a failure to comply . . . and (2) the failure must be willful [citation]." [Citation.]'" (*Vallbona v. Springer, supra*, 43 Cal.App.4th at p. 1545.) However, before the court may impose a terminating sanction, there must be a prior court order compelling compliance with discovery that has been disobeyed. (*Ruvalcaba v. Government Employees Ins. Co*. (1990) 222 Cal.App.3d 1579, 1580–1581.)

In *Collisson & Kaplan v. Hartunian* (1994) 21 Cal.App.4th 1611, the trial court imposed terminating sanctions after defendants failed to comply with a single court order to produce discovery. After failing to receive appropriate responses, or timely responses, to numerous discovery requests, the plaintiff sent the defendants letters requesting compliance with the discovery, to which the defendants failed to respond. The trial court granted the plaintiff's motions to compel, and ordered the defendants to respond to discovery. The defendants failed to comply with these orders, and the plaintiff filed a motion to strike the defendants' answer. (*Id*. at pp. 1614–1615.) After the motion was granted, the defendants filed a motion for reconsideration and responded to discovery. (*Id*. at p. 1616.) *Collisson & Kaplan* rejected the defendants' argument that "that since this was their 'first effort' at drafting responses, the trial court should not have resorted to the drastic sanction of striking their answer." (*Id*. at p. 1618.) "Defendants'

characterization of their further responses as being their 'first effort' to respond, while literally correct, is nonetheless misleading. The point that defendants fail to acknowledge is that, while this may have been their first effort to respond, it was not plaintiff's first [attempt] at receiving straightforward responses. Defendants chose to ignore the many attempts, both formal and informal, made by plaintiff to secure fair responses from them. Accordingly, we find no abuse of discretion by the trial court." (*Ibid.*)

A decision to order terminating sanctions should not be made lightly. But where "a violation is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules, the trial court is justified in imposing the ultimate sanction." (*Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262, 279.) In *Mileikowsky*, the plaintiff repeatedly failed to respond to interrogatories and inspection demands and failed to comply with court orders compelling discovery. The court repeatedly imposed monetary sanctions in connection with the orders compelling discovery. The plaintiff stipulated to provide further responses to interrogatories and inspection demands, and agreed that the defendant "'may file a motion for sanctions, including but not limited to, issue, evidence or terminating sanctions, . . . '" if the plaintiff did not produce discovery as stipulated. (*Id.* at pp. 269–273, 279.) A discovery referee concluded that the plaintiff willfully failed to comply with the stipulation and recommended that the trial court grant the defendants' motion for a terminating sanction. (*Id.* at pp. 273–274.) In light of the plaintiff's willful failure to comply with the stipulation, the prior pattern of willful discovery abuses, and the failure of the prior monetary sanctions to ensure compliance, *Mileikowsky* concluded that a terminating sanction was appropriate. (*Id.* at pp. 279–280.)

Here, the trial court did not abuse its discretion in denying Hawkins's motion for relief from default. The course of the litigation establishes that Hawkins never made any serious attempt to comply with discovery and ignored sanctions and two compulsory court orders to provide complete responses and to produce documents. Hawkins made no effort to meet and confer with Matlock's counsel over his failure to provide adequate answers or to provide an explanation why he had not done so. At the same time,

Hawkins moved to amend his complaint and sought appointment of counsel under the ADA, establishing that he could avail himself of the court's processes if it suited his purposes. In support of his motion for relief from a terminating sanction, Hawkins presented no evidence of his disability, nor did he provide a reasonable explanation of his failure to respond to the discovery.[6] These factors establish that the trial court was justified in imposing terminating sanctions, and in refusing to grant Hawkins relief from that ruling. Finally, we reject Hawkins's claims of error regarding his proposed amendment to the complaint and appointment of counsel. A terminating sanction has the effect of a dismissal of the litigation, thereby rendering any amendment of Hawkins's complaint or the appointment of counsel idle acts, and justifying the trial court's finding those issues mooted by the terminating sanction. (See *Breiner v. City of Los Angeles* (1971) 22 Cal.App.3d 382, 388.)

DISPOSITION

The order of the superior court is affirmed. Respondent is to recover his costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J. CHANEY, J.

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[6] We disregard Hawkins's declaration regarding his disabilities. Aside from the fact he did not formally move for admission of his declaration in this court (Cal. Rules of Court, rule 8.54), whether to grant a motion to consider additional evidence lies entirely within our discretion. Although we can take additional evidence of facts occurring any time prior to our decision on appeal (§ 909), our power to do so is exercised sparingly, and ordinarily we exercise it only to affirm a trial court decision. (*In re Glorianna K.* (2005) 125 Cal.App.4th 1443, 1451.)